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No. 90-1597

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1990

NATIONAL PRIVATE TRUCK COUNCIL, INC., WESTINGHOUSE ELECTRIC CORPORATION, AND ROY E. GRIFFIS,

*Petitioners,*

v.

OKLAHOMA TAX COMMISSION, ET AL.,

*Respondents.*

**Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma**

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

Respondents disagree with petitioners' characterization of the questions presented. The Oklahoma Supreme Court, concluding that "Oklahoma's mirror taxes are indistinguishable from Pennsylvania's unapportioned flat tax" which this Court struck down in *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266 (1987), held those mirror taxes unconstitutional and ordered a refund of all such taxes paid for periods occurring after the date of the *Scheiner* decision.

The question presented here, therefore, is whether the Oklahoma Supreme Court correctly concluded that *Scheiner* should be applied prospectively from its date.

Since this Court has answered that question in the affirmative, this case presents no compelling reason for review.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

## STATEMENT

In an opinion rendered on June 28, 1990, clarified on limited rehearing on March 5, 1991, the Oklahoma Supreme Court declared invalid Oklahoma's statutes imposing a tax designed to mirror certain "third structure" highway taxes, such as Pennsylvania's axle tax, struck down by this Court in *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266 (1987), and Arkansas' Highway Use Equalization tax, declared unconstitutional after remand in *American Trucking Assns, Inc. v. Gray,* 483 U.S. 1014 (1987).

The Oklahoma court concluded that Oklahoma's mirror taxes were "indistinguishable from Pennsylvania's unapportioned flat tax" (Pet. App. 14a, n.23), and that this Court in *Scheiner* had "denounced the purpose and effect of the statutes in question." (Pet. App. 22a). Concluding as it had that, under the principles announced in *Scheiner,* the challenged statutes could not stand, the court went on to determine whether its ruling was "to operate (1) retroactively from the time the taxes were first collected in 1983, (2) quasi-prospectively from the date of the *Scheiner* decision or (3) prospectively." (Pet. App. 20a)

Applying the guidelines announced by this Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the court concluded that its decision invalidating these taxes should be applied prospectively from the date of the *Scheiner* decision, and ordered refunds of taxes paid for tax periods or portions of periods occurring after that date. Petitioners' claim for attorneys' fees under 42 U.S.C. §1988, however, was denied.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION BELOW WAS CORRECTLY BASED ON *SCHEINER*

The Oklahoma Supreme Court correctly noted that this Court in *Scheiner* had condemned not only Pennsylvania's axle tax and other similar flat taxes adopted by other states, but also those retaliatory levies exacted by states such as Oklahoma to mirror those flat taxes. *See*

*Scheiner,* 483 U.S. at 285. While this Court had not previously spoken as to these taxes, the Oklahoma court concluded that these mirror taxes "are indistinguishable from Pennsylvania's unapportioned flat tax." (Pet. App. 14a) The court went on to add:

> Although *Scheiner* did not expressly overrule Oklahoma's retaliatory tax statutes, we cannot ignore the fact that the Supreme Court denounced the purpose and effect of the statutes in question. (Pet. App. 22a).

This Court recognized that the retaliatory levies by states such as Oklahoma go hand-in-glove with the third structure taxes they are designed to mirror. It is thus clear that the Oklahoma Supreme Court was correct in its reliance upon the principles announced in *Scheiner* in deciding the constitutionality of Oklahoma's mirror taxes.

The only question remaining as to this issue, then, is whether the Oklahoma Supreme Court correctly determined the appropriate application of the *Scheiner* decision to the issue of refunds. This Court has already answered that question in the affirmative.

## II. THE *SCHEINER* DECISION WAS CORRECTLY APPLIED PROSPECTIVELY

Applying the standard announced in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), the Oklahoma Supreme Court concluded that its decision, commensurate with this Court's decision in *Scheiner,* should operate quasi-prospectively, i.e., from the date of *Scheiner.* While petitioners seem to question the continued vitality of the

*Chevron Oil* standard, this Court has confirmed that retroactivity of decisions in the civil context continues to be governed by this standard. *American Trucking Assns., Inc. v. Smith,* 110 S.Ct. 2323, 2331 (1990).

Having justifiably and properly determined the constitutional issues in light of this Court's decision in *Scheiner,* the Oklahoma Supreme Court next examined the *Scheiner* decision under the *Chevron Oil* standard. First, the court concluded that *Scheiner* announced a new principle of law. That determination has already been vindicated by this Court's identical conclusion in *Smith. Id.,* 110 S.Ct. at 2331.

Next, the court considered whether retrospective operation of its decision beyond *Scheiner* was necessary to the furtherance of the principle there announced. Its decision that "[a]s a practical matter, retroactive application would not necessarily advance the further development of Commerce Clause jurisprudence" (Pet. App. 23a) is, again, fully in accord with the decision of this Court in *Smith. Id.,* at 2332.

Finally, in weighing the inequity imposed by complete retroactive application, the Oklahoma Supreme Court found that such "would impose a significant financial hardship upon the State in exercising its governmental functions." (Pet. App. 24a). This the court declined to do, which is fully consistent with *Chevron Oil.*

Contrary to petitioners' assertions, it is clearly seen that the decision below was made, not on financial considerations alone, but rather after careful examination of each factor of the *Chevron Oil* test. It is further abundantly clear that the result of that examination, applying *Scheiner*

prospectively from its date and ordering refunds accordingly, is directly in accord with this Court's decision in *Smith*.

## III. THE DECISION BELOW DENYING ATTORNEYS' FEES UNDER 42 U.S.C. §1988 WAS CONSISTENT WITH CLEAR PAST PRECEDENT, UPON WHICH THE LITIGANTS AND THE COURT COULD REASONABLY RELY

The trial court denied petitioners' claim for attorneys' fees under 42 U.S.C. §1988, and the Oklahoma Supreme Court affirmed, relying on *Consolidated Freightways Corp. of Delaware v. Kassel*, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 469 U.S. 834. That ruling was also consistent with the Tenth Circuit decision in *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469 (10th Cir. 1985). That that clear past precedent was recently overruled in *Dennis v. Higgins*, 119 S.Ct. 865 (1991), should not, especially in light of the guidelines of *Chevron Oil*, form any basis for review.

The overruling of this clear past precedent, upon which parties litigant, state legislatures and both state and federal courts have relied, clearly satisfies the first prong of the *Chevron Oil* test for prospective application. Further, petitioners here make neither showing nor suggestion that retrospective application of *Dennis* to the case at bar is in any way necessary to the furtherance of the new rule there announced. Finally, respondents suggest that *Dennis*, if applied retrospectively to this case, would only produce substantial inequitable results.

Considering this case as a whole, *Dennis* should provide no reason for review.

## CONCLUSION

The decision of the Oklahoma Supreme Court, ordering refunds of the challenged taxes for tax periods or portions of periods occurring after the date of the *Scheiner* decision, was proper, correct and in accord with applicable decisions of this Court; and further review is not warranted.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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